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Supreme Court of the United States.

October Term, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
PLAINTIFF IN ERROR AND PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
DEFENDANT IN ERROR AND RESPONDENT.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

Brief for Plaintiff in Error and Petitioner.

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Counsel for James C. Davis, Agent,
Plaintiff in Error,
Petitioner for Certiorari.

Davis v. Ind' Commission

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ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER.

Statement of the Case.

This case comes here on a writ of error and on petition for certiorari to the Superior Court of the Commonwealth of Massachusetts to review a judgment in favor of the defendant in error and respondent entered in said Superior Court in accordance with a rescript to said Superior Court from the Supreme Judicial Court of the Commonwealth of Massachusetts.

The defendant in error and respondent, by writ dated January 9, 1920 (Rec. p. 2), began an action in contract in said Superior Court for Bristol County, Commonwealth of Massachusetts, against The New York, New Haven and Hartford Railroad Company, a common-carrier corpora-

tion, to recover damages to a shipment of a carload of scrap-iron which had been shipped by the said plaintiff from Taunton, Massachusetts, in December, 1918, to a point in Pennsylvania. The shipment was not delivered to the consignee, and was returned to the shipper at Taunton, Massachusetts, in February, 1919 (Rec. p. 3). The defendant corporation duly appeared and answered (Rec. p. 4).

No further proceedings were had until in September, 1922, when the plaintiff below moved to amend its writ and declaration by striking out the name of the original defendant, The New York, New Haven and Hartford Railroad Company, and substituting in place therefor James C. Davis, Agent and Director General of Railroads, as party defendant (Rec. p. 4). Said motion was allowed in October, 1922, and an order of notice was issued and service thereof made upon a division superintendent of the carrier corporation (Rec. p. 5).

Thereafter, in November, 1922, counsel for said Davis, alleged agent, filed a special appearance for the purpose of contesting jurisdiction (Rec. p. 6), and also a motion to dismiss (Rec. p. 7), upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above-named defendant.

2. That the issuance and service of said writ summoning the above-named defendant to appear and answer are null and void, because in violation of and in conflict with section 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above-named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above-named defendant was not instituted in the manner provided by the above-named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above-named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act, and therefore said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above-named defendant that no service of said writ has been made upon the above-named defendant in accordance with the provisions of the laws of Massachusetts, and therefore such service is null and void.

Said motion to dismiss filed by plaintiff in error and petitioner herein was denied, and said denial duly became the subject of a bill of exceptions to the Supreme Judicial Court of Massachusetts (Rec. pp. 12-14).

Thereafter, plaintiff in error and petitioner herein, James C. Davis, not waiving his motion to dismiss and not admitting the jurisdiction of the Court over him, and in pursuance of an order of Court, filed an answer to the merits (Rec. p. 8), setting up as one ground of defense the claim that, as required by the terms of the bill of lading, the suit as against him was not begun within two years and one day after a reasonable time for delivery of the property had elapsed, because, although delivery of shipment was tendered in February, 1919, the action as against said Davis was not begun before October, 1922 (Rec. p. 16).

Subsequently the action was tried to a jury, at the end of which the trial judge directed a verdict for the Federal Agent Davis, defendant therein and plaintiff in error and

petitioner herein. The trial judge, in accordance with Massachusetts practice, reported the case to the Supreme Judicial Court of Massachusetts, the report embodying the answer of the defendant Davis and a statement of the facts (Rec. pp. 9-12).

The opinion of the Supreme Judicial Court (Rec. pp. 17-19) sustained the lower Court in denying the motion to dismiss, and held that the direction of a verdict for the defendant below at the trial on the merits was wrong. In so deciding the Supreme Judicial Court followed earlier decisions in that Court, and held that the Federal Agent as representative of the United States Railroad Administration could be made a party by substitution in an action which originally was wrongly brought against a corporate carrier; held that such substitution could be made at a time later than two years after the end of Government control of carriers; held that the action as against the representative of the Government was begun, not when said representative was substituted, but when the original action was begun against the corporation, and was therefore not barred by the two-year provision as to suit contained in the bill of lading.

Specification of Errors Relied On.

It is respectfully urged that this judgment of the Superior Court of Bristol County of the Commonwealth of Massachusetts should be reversed, for the following reasons:

1. The Supreme Judicial Court for Massachusetts, in holding that the representative of the Federal Railroad Administration can be made a party by substitution in any case where the action originally was wrongly brought against the railroad corporation, is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50-A of the United States Railroad Administration.

2. The Supreme Judicial Court for Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally wrongly brought against the railroad corporation, was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

3. In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation, the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

4. The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

5. The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is therefore in conflict with the Act to Regulate Commerce.

6. In holding that the representative of the Government can be made a party by substitution in an action originally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation

Act and also with principles of law enunciated by this Court.

7. In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that section 206 (a) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act, which applies to any and all proceedings instituted thereafter against the Government.

8. In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

Questions Involved.

Substantially the questions involved herein relate to the power of the State Court to substitute the representative of the United States Railroad Administration in a pending action originally brought against a carrier corporation for a cause of action arising out of the possession and operation by the President of the railroads of the country. These questions may be stated:

1. Whether there is any power at all to make the substitution;

2. Assuming the power to substitute, whether the substitution can be made "later than two years from the date of passage of" the Transportation Act;

3. Assuming the power to substitute, whether the substitution can be made after the lapse of the two-

year-and-one-day period for bringing suit prescribed by the conditions of the bill of lading;

4. Whether the substitution of the Federal Agent was the beginning of a new cause of action as to him; and—

5. Whether the provisions of the Massachusetts statutes purporting to authorize the substitution of parties in pending actions as construed by the Massachusetts Court are repugnant to the provisions of the Transportation Act.

Argument.

I. THE STATE COURT HAD NO POWER AT ALL TO MAKE A SUBSTITUTION WHERE THE ACTION WAS BEGUN ERRONEOUSLY.

(1) *Summary of legislation authorizing suits.*

From the beginning of Federal control to the passage of the Federal Control Act there was no explicit direction concerning the title or description of the defendant against whom suit should be brought, although the President in his proclamation December 26, 1917 (40 St. L. part II, 1733), provided that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

On March 21, 1918, the Federal Control Act (40 St. L. 451, c. 25) became effective. Section 10 of this Act in part is as follows:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers

and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. . . ."

The Director General of Railroads on October 28, 1918, issued General Order 50 (U.S. R.R. Administration Bulletin #4, p. 334), which in part read as follows:

> "IT IS THEREFORE ORDERED, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, *shall be brought** against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures. . . .
>
> "The pleadings *in all such actions* at law, suits in equity, or proceedings in admiralty, *now pending* against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom. . . ."

(General Order 50-A, dated January 11, 1919, amended General Order 50 by striking out the name of William G.

*All italics in this brief are those of counsel.

McAdoo, so that actions at law, etc., were to be brought against the Director General of Railroads without specifying him by name.)

From the date of the Federal Control Act and by the provisions of that Act action properly was to be brought against the "carriers." This meant the Director General of Railroads. However, until General Order 50 was issued, it was perhaps natural to name the corporate carrier as defendant. From the date of General Order 50, however, the doubt was cleared away, as that order provided that actions, etc., "shall be brought against" the Director General by name.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

No further changes were made until the carriers were returned to their owners as provided for by the Transportation Act (Act of Febuary 28, 1920; 41 St. L. 456, c. 91). The pertinent provisions of section 206 of this Act as passed are as follows:

> "Sec. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) *of such character as prior to Federal control could have been brought against such carrier*, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction

of the cause of action had it arisen against such carrier; . . .

"(d) Actions, suits, proceedings, and reparation claims, *of the character above described pending* at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). . . ."

Finally, as a result of the action of this Court in dismissing *Payne* v. *Industrial Board*, 258 U.S. 613; *Payne* v. *Stevens*, 260 U.S. 705; and *United States Railway Administration* v. *Slatinka*, 260 U.S. 747, the Winslow Act was passed (March 3, 1923, c. 233; 42 St. L. 1443), which added paragraphs (h) and (i), in part as follows:

"(h) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (a), (c), or (d), *properly commenced* within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. . . .

"(i) Orders providing for a substitution *in such cases* made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which

have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

(2) *The plaintiff below, defendant in error and respondent herein, did not bring itself within the permission granted.*

The original action here was begun in January, 1920, against a railroad corporation, and not against a representative of the United States Railroad Administration. General Order 50 had been in effect more than a year. The action, therefore, was improperly begun.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

No authority for the method here pursued can be found in any of the Federal statutes or the General Orders of the Director General, which are the source of any right the plaintiff below may have had to bring its action. Section 10 of the Federal Control Act gives no authority at all for substitution. It specifically provided that liabilities of common carriers under Federal control should be subject to any order of the President.

Nor do the provisions of General Order 50 furnish any authority for the substitution which was made in the case at bar. Not only did General Order 50 require suit to be brought against the Director General, but the only substitution allowed was in actions, etc., then *pending*.

The Transportation Act as originally passed in no way helps the defendant in error and respondent herein, plaintiff below. The provision therein relative to substitution of the Federal Agent is carefully limited to substitution in actions, etc., "*of the character above described*," which are "*pending*" at the end of Federal control. Obviously the phrase "of the character above described" refers to

actions, etc., set forth in sub-paragraph (a), that is, actions "of such character as prior to Federal control could have been brought against such carrier."

Finally, the last legislation on the subject was by the Act of March 3, 1923, adding two paragraphs to the Transportation Act. Here also the matter of substitution was the subject of legislation by Congress. But the permission to substitute was granted only where the actions, etc., had been "*properly commenced within the period of limitation prescribed.*" Although the Winslow Act was passed after the substitution was attempted in the case at bar and has no relevancy to the issues in the present case, nevertheless, it would seem as if Congress, when it had the question of substitution before it, would have provided specifically for substitution in cases improperly begun had it been the desire of Congress to permit substitution in such cases. It is a fair inference from the passage of the Winslow Act that in none of its legislation did Congress intend to broaden the rights of litigants and permit substitution in actions improperly commenced.

(3) *The United States may not be sued without its consent, and statutes granting that consent will be most strictly construed.*

What was the effect of Federal control of the carriers appears now to be fairly well settled. The United States took over a complete and not a divided control of the railroad systems and operated them directly. It is also settled that actions, etc., against the Railroad Administration were suits against the United States, which was the real party in interest.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U.S. 135.

Missouri Pacific R. Co. v. *Ault*, 256 U.S. 554.

Alabama & Vicksburg R. Co. v. *Journey*, 257 U.S. 111.

Director General v. *Kastenbaum*, 263 U.S. 25.
E. I. DuPont de Nemours & Co. v. *Davis*, 264 U.S. 456.

In *Davis* v. *O'Hara*, decided by this Court November 24, 1924, it was said:

> "The General Orders are, in legal effect, the orders of the President, and are valid. This is an action against the United States. The railroads were taken over and operated by it in its sovereign capacity, and it will not be held to have waived any sovereign right or privilege unless it has plainly done so [citing cases]. Its immunity from suit was waived only to the extent indicated by the statute and orders of the Director General."

In *E. I. DuPont de Nemours & Co.* v. *Davis*, *supra*, p. 462, this Court said:

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain' [citing cases]; and it may not be held to have waived any sovereign right or privilege unless plainly so provided."

See also *Davis* v. *Corona Coal Co.*, 265 U.S. 219.

It is not necessary to cite authorities at length to the rule of strict construction where the sovereign grants rights of action where none existed before. One or two cases illustrate the principle clearly. In *United States, ex rel. Texas Portland Cement Co.*, v. *McCord*, 233 U.S. 157, there was involved an Act of Congress giving creditors of a contractor for the United States a right to sue in the name of the United States upon the contractor's bond if the United States itself did not bring suit within six months. The United States there brought no suit, and stated that

it was not going to. In holding that the action would not lie, as prematurely brought, when begun within six months, this Court said:

> "The statute thus creates a new liability and gives a special remedy first, and upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

After the six months within which the United States might bring action had elapsed and within the twelve months within which suit must be brought, another creditor intervened in the original proceeding by filing a complete bill, which purported to be for the benefit of all creditors, etc. As to this proceeding the Court said, p. 163:

> "The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, *presuppose an action duly brought under its terms.* In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. *The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit.* No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate [from the Circuit Court of Appeals], the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

So it has been held that, in suits against the Government where a personal action has been brought against some officer thereof, substitution of his successor is not permitted except where a statute expressly allows it.

Pullman Co. v. *Croom*, 231 U.S. 571.

And this Court has held also that, even where such substitution was authorized by statute, it could be allowed only where a suit had been lawfully commenced against the officer.

Smietanka v. *Indiana Steel Co.*, 257 U.S. 1.

While there has been, so far as counsel is advised, no decision by this Court of the question now presented, this Court denied a petition for certiorari in *Fischer* v. *Wabash Railroad et al.*, 263 U.S. 706. The action originally was brought in the Supreme Court of New York in January, 1922, against certain corporate carriers. In March, 1922, the defendants filed answers setting up the fact of Federal control. Thereafter the plaintiff sought to substitute the Federal Agent as defendant. The trial Court's denial of this application was affirmed by the Appellate Division and later by the Court of Appeals (235 N.Y. 568).

The question of procedure in suits against the Railroad Administration has come before the lower Courts of the country in many cases and has been decided variously. It does not seem worth while to refer to them. Generally the Federal Courts have adopted a rule of strict construction as appears from *Davidson* v. *Payne* (C.C.A. 8th Circuit), 289 Fed. 69, and *Whalen Paper & Pulp Mills* v. *Davis* (Ct. of Appeals, D.C.), 288 Fed. 438.

In *Davidson* v. *Payne* action was begun April 21, 1921, and the Court took judicial notice that Payne resigned March 28, 1921, saying:

"This is not a case where the plaintiff has failed to move the substitution of the successor of the defen-

dant Payne as agent within 12 months from the date of his resignation. It is a case where John Barton Payne has been sued as such agent after he had resigned *the office and after his successor,* Davis, had been appointed. Since his resignation on March 28, 1921, John Barton Payne has had no authority to represent the President of the United States in any litigation arising out of the operation of railroads during the World War. Appellant brought suit against the wrong party, and must abide the consequences of his mistake."

In *Whalen Paper & Pulp Mills* v. *Davis* the action was for damage to a freight shipment from Texas to Canada and was begun in the District of Columbia by personal service on the defendant. Referring to the provisions of section 206 of the Transportation Act, and the method of serving process, the Court said:

"The latter provisions, like their predecessors, were designed as authoritative provisions for the regulation of such litigation, and like them were mandatory in character. Accordingly the mode of service attempted in this case was unauthorized and was rightly set aside.

"These conclusions, furthermore, are consistent with the fair import of the language of paragraph (b), for where permission is granted under certain express conditions to serve process in a given manner, it is thereby implied that the authority cannot be exercised under opposite conditions. . . .

"It will be understood, of course, that the foregoing reasons all rest finally upon the conceded rule that, when the United States consents to be sued, the method of procedure prescribed by Congress as part of the consent must be strictly followed, in order to secure jurisdiction; for in such case the remedy of the suitor

depends wholly upon the Government's consent, and it cannot be enlarged beyond the clear terms thereof. This rule applies also where a particular method of serving process is pointed out by the statute [citing cases]."

II. Assuming the general power in the State Court to substitute the Federal Agent, nevertheless the substitution was the beginning of a new cause of action as to him, and therefore had to be made before any period of limitation had expired.

(1) The granting in the trial Court of the motion to substitute James C. Davis, Agent, as the sole party defendant in the place of the carrier corporation worked an entire change of the party defendant. The defendant in error, plaintiff below, brought suit against the wrong party, and should abide the consequences of its mistake. The provisions of law as to bringing suits were designed as authoritative provisions for the regulation of litigation and were mandatory in character. These provisions imposed conditions on the exercise of a privilege granted by Congress. The amendment allowed in the Court below brought in a new party, and was both a departure from law to law and the assertion of a new cause of action. The amendment was not a mere expansion or amplification of what was alleged in support of the cause of action already asserted, and it did not and could not relate back to the commencement of the action.

Union Pacific R. Co. v. *Wyler*, 158 U.S. 285, 295-297.
United States v. *Dalcour*, 203 U.S. 408, 423.
Seaboard Air Line Ry. Co. v. *Renn*, 241 U.S. 290, 293.

It seems clear that such is in fact the case. In the first place, the parties defendant in the Court below were wholly

separate and distinct entities. The carrier corporation in no respect represented the United States Railroad Administration. During the period of Government control, when the alleged cause of action accrued, the interests of the parties were in fact adverse. The carrier corporations, as the Court well knows, maintained during the period of Federal control their separate corporate organizations. The employees of the Railroad Administration were employees of the Federal Government, and as such were not subject to State income taxes, and the carrier corporations made claims upon the Federal Government and were paid for damages or losses resulting from Federal operation.

In the second place, the cause of action against the Railroad Administration was separate and distinct from that set forth in the declaration filed by the plaintiff below (Rec. p. 3). The cause of action first asserted arose out of the liability of a common carrier at common law, as changed, perhaps, by the provisions of the Carmack Amendment to the Interstate Commerce Act. But the right to proceed against the Federal Government for a cause of action arising out of Federal control of carriers is derived from an altogether different source. The plaintiff below could not proceed without invoking and relying upon the permission granted to sue the Federal Government.

So far as counsel is advised, this Court has not passed on this question except indirectly. On October 22, 1923, this Court denied a petition for a writ of certiorari in *Chrisp* v. *Davis*, 263 U.S. 710. Suit there was begun in Arkansas against the Missouri Pacific Railway Company for injuries received while engaged in interstate commerce during the period of Federal control. The original action was begun within two years from the date of the accident. After two years had expired a demurrer to the action was sustained on the ground that the corporation was not liable for injuries accruing during Federal control. The plaintiff thereafter procured an order substituting the Federal Agent as

defendant, and to that the statute of limitations was pleaded. The Supreme Court of Arkansas, reversing the trial Court, held that the substitution was equivalent to the bringing of a new suit, and that the statute of limitations was a bar.

(2) If the premise be correct, it follows that the right of action was barred when in October, 1922, the substitution was attempted. This is true for two reasons, first, because the provisions of the Transportation Act required actions to be begun not later than two years after the termination of Federal control, and, second, because the conditions of the bill of lading required action to be begun within two years and one day after delivery of the property or after a reasonable time for delivery has elapsed. The latter date, as appears from the opinion of the Supreme Judicial Court of Massachusetts (Rec. p. 17), was in February, 1919.

III. MASSACHUSETTS GENERAL LAWS, CHAPTER 231, SECTIONS 51 AND 138, AS CONSTRUED BY THE STATE COURT, ARE REPUGNANT TO FEDERAL LAWS, PARTICULARLY THE PROVISIONS OF THE TRANSPORTATION ACT.

Massachusetts General Laws, c. 231, secs. 51 and 138, are as follows:

> "SECTION 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defence."
>
> "SECTION 138. The cause of action shall be considered to be the same for which the action was brought,

> if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action. But no subsequent attaching creditor or purchaser of property attached or bail or any person other than the parties to the record shall be bound by such allowance unless he has had due notice of the application for leave to amend and opportunity to be heard thereon, according to an order of notice to that effect to be issued by the court upon application of the plaintiff, and such third parties shall have the right of exception or appeal."

In its opinion (Rec. p. 18) the Supreme Judicial Court construed subsection (a) of section 206 of the Transportation Act, and held that "that subsection purported to deal only with the time within which actions might be commenced where the cause thereof arose during Federal control and no action was brought during that period," but that, when a suit was begun, though against a wrong party, the plaintiff's rights were saved. The State Court therefore held that subsection (d) of section 206 of the Transportation Act permitted substitution in actions pending at termination of Federal control, whether rightly or wrongly commenced. So far the decision was a construction of the Transportation Act which properly should come before this Court by petition for a writ of certiorari.

But the Supreme Judicial Court of Massachusetts, not content with its construction of the Transportation Act, proceeded to construe the State statute as to amendments, and stated (Rec. p. 18):

> "Even if section 206 (a) were applicable, the Massachusetts law as to amendments does not regard such substitution as the commencement of a new action, and

> it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since the termination of Federal control."

In support of this opinion, it cited two prior decisions, wherein it had passed upon the same question. In *Aetna Mills* v. *Director General of Railroads*, 242 Mass. 255, 258, it held that the substitution was lawful and in accordance with the practice in Massachusetts. Massachusetts General Laws, c. 231, secs. 138 and 51, were quoted. So in *Genga* v. *Director General of Railroads*, 243 Mass. 101, 104, the Court treated the question purely as one of settled practice. In both of these decisions it was held that the State practice was imported into proceedings in the State Courts against the Government of the United States for redress of grievances arising out of Federal control. And in *Genga* v. *Director General of Railroads*, at page 111, it was said:

> "To hold that there can be no amendment in the case at bar would operate as a genuine hardship because the statute of limitations has long ago run against one of the plaintiff's alleged claims and he can not prosecute it unless allowed to amend."

It is submitted that the Supreme Judicial Court of Massachusetts was deciding a matter of substance, and not of procedure, and was applying to a cause of action against the Federal Government, granted by Act of Congress, the special regulations and policies of the Commonwealth of Massachusetts. In other words, the construction of the State law as to amendments makes that Act repugnant to the Federal laws.

It is submitted that, when by the very statute creating the right of action the lapse of time not only bars the remedy but destroys the liability, the question of the time

when the Federal Agent may be substituted becomes a matter of substance, and not of procedure.

> *Central Vt. Ry. Co.* v. *White*, 238 U.S. 507, 511.
> *Phillips* v. *G.T. Ry. Co.*, 236 U.S. 662.

This is true as to the burden of proof; under the Federal Employers' Liability Act the plaintiff must affirmatively establish negligence whatever the State rule may be. It is a matter of substance, and local *prima facie* statutes become inapplicable.

> *Central Vt. Ry. Co.* v. *White, supra.*
> *New Orleans & N.E. R. Co.* v. *Harris*, 247 U.S. 367.

So it is with reference to directing verdicts.

> *North Penna. R. Co.* v. *Commercial Bk.*, 123 U.S. 727.

And this Court has held generally that the special regulations and policies of the particular States on the subject of the carrier's liability for loss and damage to interstate shipments and the contracts of carriers with respect thereto have been superseded.

> *M., K. & T. Ry. Co.* v. *Harris*, 234 U.S. 412, 420.

In *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 21, this Court stated:

> "The law of the United States can not be evaded by the forms of local practice . . . The local rule applied as to the burden of proof narrowed the protection that the defendant had secured and therefore contravened the law."

In *Davis* v. *Wechsler*, 263 U.S. 22, 24, involving the validity of General Order 18-A, this Court said:

> "Whatever springes the state may set for those

who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . If the Constitution and laws of the United States are to be enforced, this Court can not *accept as final the decision of the state* tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds . . . This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

IV. Conclusion.

It is respectfully submitted that the judgment of the Superior Court for the Commonwealth of Massachusetts entered in accordance with the rescript from the Supreme Judicial Court should be reversed.

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